public servant from discharging his duty; therefore the conviction must be set aside.

MAGISTRATE'S CRIMINAL APPEAL.

S. Natha Singh for the appellant.

Haji Suhaimi bin Dato' Kamaruddin (Deputy Public Prosecutor) for the respondent.

Ong Hock Sim J. (delivering oral judgment): This appeal is not one which rests solely on a question of fact. Section 349 defines what is force and criminal force is defined in section 350. The illustrations thereto show that some application of force to the other party is required to amount to using criminal force. Assault however requires no contact with the body and section 351 says any gesture or preparation which causes the other person to apprehend that he who makes that gesture or preparation is about to use criminal force is assault.

In this particular case, there is the so-called movement of the appellant's hand which was at that time holding a chopper followed by the words "if you go in, I will hammer you." Whatever that may be, certainly it did not constitute use of criminal force. It could perhaps come under section 503 of the Penal Code:

> "Whoever threatens another with any injury to his person, reputation, or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation."

That gesture followed by the words could amount to criminal intimidation.

To substantiate the charge it must be shown that criminal force has been used. I would read the very passage which the learned deputy public prosecutor has read:

> "The criminal force used by accused on Tan (P.W.1) was used when accused raised his meat chopper, contemporaneously with the threatening words, i.e. at the juncture Tan (P.W.1) told accused he wanted to go into rear portion of the premises."

Again the charge here is that the accused used criminal force to a public servant to prevent him from discharging his duty. It was in evidence and it was agreed that at that time P.W.1 had not shown his letter of authority. It is therefore a mere presumption that his uniform is sufficient identification of himself as a public servant. Then he goes on to say:

> . . . . even if after Tan (P.W.1) had formally identified himself, had shown the letter of authority (P.2) to accused, accused further used criminal force on Tan (P.W.1) by going on to say that even the Chief Minister Mr. Wong Pow Nee could not enter the back portion of the shop."

He held that after this formal identification of the identity by Tan (P.W.1) accused should have allowed and not prevented Tan (P.W.1) in law a public servant from the execution of his duty as such public servant.

Now this is what P.W.1 said:

> "I showed accused my letter of authority and told him I am authorised to enter the back portion of the shop. He said even the Chief Minister, Mr. Wong Pow Nee cannot enter into the back portion of the shop. Since he said earlier he would assault me, I did not enter the back portion of the shop."

This is what P.W.3 says:

> "P.W.1 showed to accused one letter of authority. Accused said Dato' Wong Pow Nee's order, no one can enter inside."

If that is a fact then this seems to me to be more in line with the defence. But having come to accept the evidence of P.W.1 in toto, the learned magistrate held that after his formal identification accused should have allowed and not prevented a public servant from the execution of his duty as such public servant. I find no evidence that Tan was prevented. It was an inference of Tan from the words, that he would be prevented from doing so, and he did not try to enter the rear of the shop.

I find having regard to the fact that the accused had been fairly co-operative with P.W.1 to the extent of producing his National Registration Identity Card to P.W.1 that he was not likely to resist any exercise of authority of P.W.1 if he was minded to do so. That is substantiated by the particulars of the appellant's National Registration Identity Card which are entered in the police report.

In the circumstances I allow the appeal and quash the conviction and order that the fine be refunded to the accused if it had been paid.

Appeal allowed.

Solicitors: *Natha Singh & Subbiah.*

MOONEY & ORS. v. PEAT, MARWICK, MITCHELL & CO. & ANOR.

[O.C.J. (Raja Azlan Shah J.) September 1, 1966]

[K.L. — Civil Suit No. 324 of 1965]

Practice and Procedure — Pleadings — Application to strike out statement of claim — Claim by shareholders against accountants and secretaries of company — Whether shareholders entitled to bring action — R.S.C., 1957, O. 25 r. 4.

This was an application to set aside a statement of claim as disclosing no reasonable cause of action. The plaintiffs were shareholders of a company and they brought the action against the accountants and secretaries of the company alleging breach of their duties. It was argued that the action could only have been brought by the company.

Held: (1) the rule in *Foss* v. *Harbottle* [5] was not applicable as that rule was only referrable to domestic activities and internal managements of companies;

(2) in this case it was alleged that there was a breach of the duty of care arising from contract, it could not be said that the claim disclosed no reasonable cause

of action and therefore the application to strike out the statement of claim must be dismissed.

Cases referred to:—

(1) *Hubbuck & Sons* v. *Wilkinson, Heywood and Clark Ltd.* [1899] 1 Q.B. 86, 91.

(2) *Peck* v. *Russell* (1923), 4 F.M.S. L.R. 32, 34.

(3) *Boaler* v. *Holder* (1886), 54 L.T. 298.

(4) *Wenlock* v. *Moloney* [1965] 1 W.L.R. 1238, 1243.

(5) *Foss* v. *Harbottle* (1843), 2 Hare 261.

(6) *Burland* v. *Earle* [1902] A.C. 83, 93.

(7) *Edwards* v. *Haliwell* [1950] 2 All E.R. 1064, 1066.

(8) *Candler* v. *Crane, Christmas & Co.* [1951] 2 K.B. 164.

(9) *Hedley Byrne & Co.* v. *Heller and Partners* [1963] 2 All E.R. 575.

(10) *Re London and General Bank (No. 2)* [1895] 2 Ch. 673.

(11) *Re Kingston Cotton Mill Co. (No. 2)* [1896] 2 Ch. 279 at p. 288.

(12) *Re City Equitable Fire Insurance Co. Ltd.* [1925] 1 Ch. 407.

CIVIL SUIT.

M. Edgar for plaintiffs.

D. G. Rawson for defendants.

Cur. Adv. Vult.

Raja Azlan Shah J.: The question in this application is whether the statement of claim ought to be struck out under Order 25 r. 4 of the Rules of the Supreme Court as disclosing no reasonable cause of action.

The plaintiffs were shareholders of a company incorporated under the style of Kiwi Dry Cleaners Ltd. and registered in the Federation of Malaya, now States of Malaya, in 1959 under the Companies Ordinance, 1946. The defendants are accountants and secretaries as well as auditors practising under the style of Peat, Marwick, Mitchell & Co. in Kuala Lumpur.

Paragraph 3 of the claim avers that the defendants were employed as accountants and secretaries of the plaintiffs' business, i.e. the business of the company in Kuala Lumpur, and subsequently as auditors. Paragraph 4 avers that the terms of the said employment were expressly agreed to and were *inter alia* that the defendants as accountants and secretaries were to make weekly visits to the plaintiff's place of business, check the accounts, counter-sign cheques, and generally to see that the plaintiffs' business was properly and profitably carried out. Paragraph 5 avers that the defendants as auditors expressly agreed to prepare and send to the plaintiffs quarterly balance sheets of the plaintiffs' business. Paragraph 7 avers that the defendants during the time the plaintiffs were shareholders in the company were in breach of the said terms and of their duties as accountants and secretaries and as auditors; there are eight sub-paragraphs specifying the alleged breaches of terms of employment. Paragraph 8 sets out the particulars of loss. Paragraph 10 avers that as a result of the defendants' breach of their aforesaid duties and resultant loss the plaintiffs were forced to sell the company without the opportunity of claiming goodwill. Further and better particulars of the statement of claim were asked for and delivered. It was disclosed that the plaintiffs became shareholders on December 15, 1959. They sold their shares on November 30, 1961. No defence has been filed.

It is firmly established that the power exercisable under r. 4 "is only appropriate in cases which are plain and obvious so that a judge can say at once that a statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to the relief of which he asks for": see the judgment of Lindley M.R. in *Hubbuck & Sons* v. *Wilkinson, Heywood & Clark Ltd.*(1) Where the situation arises, the pleadings and particulars alone shall be considered and all the allegations in it shall be presumed to be true, and it is only on that assumption that any statable case can be made for this application: see *Peck* v. *Russell.*(2) The court cannot and indeed is not empowered to look behind the pleadings and particulars if it discloses a reasonable cause of action. So long as the statement of claim discloses *some* ground of action the mere fact that the plaintiff is not likely to succeed on it at the trial is no ground for it to be struck out: see *Boaler* v. *Holder.*(3) A recent exposition of the law is afforded by the judgment of Danckwerts L.J. in *Wenlock* v. *Moloney.*(4)

> "Under the rule (i.e. O. 25 r. 4) it had to appear on the face of the plaintiff's pleading that the action coud not succeed or was objectionable for some other reason. No evidence could be filed. . . . But, as the procedure was of a summary nature the party was not to be deprived of his right to have his case tried by a proper trial unless the matter was clear."

After stating that the former rules are now incorporated in the revised Rules of the Supreme Court, O. 18 r. 19, he continues:

> "But this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge."

The defendants argued that the case fell within the ambit of the rule in *Foss* v. *Harbottle.*(5) Counsel therefore contends that the proper plaintiff in the present case would be the company but not the shareholders. The rule in *Foss* v. *Harbottle, supra,* as I see it, is concerned with the principle of the supremacy of the majority rights of shareholders in a joint stock company. These are rights which a member has agreed to submit to the will of the majority provided that that will is expressed in

accordance with the law and articles of association. The relevant principle of law cannot be stated with any greater precision than the judgment of Lord Davey in *Burland* v. *Earle*: [6]

"It is an elementary principle of the law relating to joint stock companies that the court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so. Again, it is clear law that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should *prima facie* be brought by the company itself. These cardinal principles are laid down in the well-known cases of *Foss* v. *Harbottle* and *Mozley* v. *Alston* . . . .".

There are exceptions to the rule which I do not think it necessary to cite. The rule is pre-eminently procedural in character and that was clearly expressed in a re-statement of the rule by Jenkins L.J. in *Edwards* v. *Haliwell*.[7] It is manifest, therefore, that the reasoning on which the rule is founded is that in all these cases it is for the company to complain by suing the alleged wrong-doer; the company is thus the proper plaintiff and the company is the majority. It is also manifest that the rule is only referable to domestic activities or internal managements of companies.

Counsel for the plaintiff cited two authorities, *Candler* v. *Crane, Christmas & Co.*[8] and *Hedley Byrne & Co.* v. *Heller & Partners*.[9] With regard to the first case I shall content myself with saying that in my opinion *Candler's* case (which was a majority decision of the Court of Appeal) may be regarded as an outstanding example of the principle that where there is no contractual duty there is no liability for negligence if the damage complained of is not physical. It is noteworthy also for the fact that there is a dissenting judgment by Denning L.J. (*ibid* at p. 17) which has attracted considerable attention. The effect of the majority decision of the Court of Appeal is, I think, that accountants and auditors owe no duty of care to anyone but their clients. Denning L.J. in his dissenting judgment said he thought that the law would fail to serve the best interests of the community if it should hold that accountants and auditors owed a duty to no one but their clients. So much for that case. *Hedley's* case is concerned with the proposition that wherever there is a relationship equivalent to contract there is a duty of care, and the relationship may be either of a general character, for example, the relationship of solicitor and client or of banker and customer, or of a particular character created *ad hoc*. The speech of Lord Devlin contains excerpts which I think are far-sighted. He remarked that the relationship may well go beyond contract, and I quote:

"There may well be others yet to be established . . . . Cases may arise in the future in which a new and wider proposition, quite independent of any notion of contract, will be needed."

No doubt that speech is in line with the observation of Denning L.J. in his dissenting judgment in *Candler's* case.

In my judgment the above cases recite the proposition that wherever a relationship in contract exists between the parties, the duty of care arises. The standard of care required of an accountant and auditor is well illustrated in *Re London & General Bank (No. 2)*,[10] in *Re Kingston Cotton Mill Co. (No. 2)*,[11] in *Re City Equitable Fire Insurance Co. Ltd.*[12] The duties of a secretary are mainly statutory and some of these are conveniently summarised in *Palmer's* "Company Law" 20th edn. at p. 590. The plaintiffs by their claim are relying on the proposition of law as stated in *Candler* v. *Crane, Christmas & Co., supra*, as extended by *Hedley's* case. I am not concerned at this stage with the merits of the case. That have to be gone into in the light of the evidence properly adduced at the trial and to deal with that aspect of the case summarily would be to usurp the province of the trial judge. I am only concerned with the problem that the claim disclosed some cause of action and that the plaintiffs are the proper plaintiffs. In my view the answers are in the affirmative. The rule in *Foss* v. *Harbottle, supra*, cannot be accommodated in the present case because the facts as alleged in the pleadings do not cover "domestic proceedings" of a company. The present case is not a plain and obvious case to strike out the pleadings as disclosing no reasonable cause of action. The application is therefore dismissed with costs.

Application dismissed.

Solicitors: *Morris Edgar & Co.; Shearn, Delamore & Co.*

COMPTROLLER OF INCOME TAX v. A.B. ESTATES LTD.

[F.C. (Barakbah L.P. Ismail Khan and MacIntyre JJ.) September 5, 1966]

[Ipoh — Federal Court Civil Appeal No. X13 of 1966]

Income Tax — Artificial transaction — Whether lease of rubber estate at uneconomic rental an artificial transaction — Income Tax Ordinance, 1947, s. 29.

This was an appeal against the decision of a judge of the High Court ([1966] 1 M.L.J. 260) allowing an appeal by the respondent from a decision of the board of review. The respondents were a limited liability company and had acquired a rubber estate, which they let to a subsidiary company of theirs, at the rental of $1,200 per annum. It was common ground that at the time of the lease the average net profit earned by the rubber estate was about $16,000 per annum. The comptroller held that the lease of the rubber estate to the subsidiary company at the rental of $1,200 per annum was an artificial transaction within the meaning of section 29 of the Income Tax Ordinance and included the nett income of the rubber estate in the assessable income of the respondents. On appeal the board of review upheld